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Supreme Court of the United States

OCTOBER TERM, 1939

No. 44

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,

Petitioner,

against

COMPAGNIE GENERALE TRANSATLANTIQUE,

Respondent.

BRIEF OF *AMICI CURIAE*

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against

COMPAGNIE GENERALE TRANSATLANTIQUE,

Respondent.

BRIEF OF AMICI CURIAE.

This brief is filed by special leave of Court, pursuant to Rule 27, paragraph 9, with written consent of all parties to the case, dated November 29, 1939, and filed with the Clerk.

Preliminary Statement.

The statement in respondent's brief adequately relates the facts. The picture presented is one of a movement of oil originating in Venezuela (R. 105, 197), carried to Bayonne and Bayway, New Jersey, there landed and deposited in tanks of the Standard Oil Company of New Jersey (R. 191), supervised by United States customs storekeepers (R. 189, 193), transported thence in barges sealed by customs inspectors and discharged under customs supervision into vessels of foreign registry (R. 64) engaged in foreign trade, which in a short time thereafter leave this

country for foreign ports (R. 85, 120). The oil is of two classes: (1) bonded oil, which on importation is placed in bonded tanks at Bayonne, New Jersey, without payment of import tax (R. 188), and (2) drawback oil, which on importation in crude form is placed in tanks at Bayonne and Bayway, New Jersey. The import tax is paid on this oil on arrival. It is, however, segregated and identifiable as drawback oil (R. 194). Otherwise it would lose its right to drawback. The United States exempts this bonded and drawback oil from taxation in order to foster and encourage foreign commerce, a subject clearly within federal power.

We contend that in such circumstances the City of New York has no power to impose a tax on receipts from sales of this fuel oil.

Summary of Argument.

I. The sales of bonded and drawback oil involved transactions in interstate and foreign commerce on which the City has no power to impose a sales tax.

II. The bonded and drawback oil never became a part of the general mass of property in the City of New York and therefore is exempt from the New York City sales tax by virtue of the commerce and imports clauses of the Constitution.

III. Fuel oil supplied to vessels engaged in foreign trade is an export and therefore is exempt from the New York City sales tax by virtue of Article 1, Section 10, Clause 2 of the Constitution, prohibiting state taxation of exports.

Conclusion: The Court should rule that the bonded and drawback oil involved in this case is exempt from the New York City sales tax.

ARGUMENT.

I.

The sales of bonded and drawback oil involved transactions in interstate and foreign commerce on which the City has no power to impose a sales tax.

The fuel oil involved in this transaction was delivered from tanks of Standard Oil Company of New Jersey, located at Bayonne and Bayway, New Jersey, to respondent's vessels lying in New York harbor. The deliveries thus made unquestionably were in interstate and foreign commerce. Standard Oil Company of New Jersey has no tanks or other installations in New York. Its only storage facilities or installations from which this bonded fuel oil could be delivered to respondent's vessels are those located at Bayonne and Bayway, New Jersey (R. 192).

The contract of sale between the French Line and Standard Oil Company of New Jersey is in the form of a letter (Taxpayer's Exhibit 10, R. 37, 236). It is an extension of a series of previous contracts (Taxpayer's Exhibits 1-9 inclusive; R. 33-37, 228-235), which show that the commodity contracted for was "Standard" Bunker Fuel Oil (R. 230, 232, 234). At the time the first contract was made Mr. Cauchois of the French Line went to New Jersey on two occasions and inspected the plant of Standard Oil Company of New Jersey there (R. 29, 30). The contracts clearly contemplated that this bonded bunker "C" fuel oil should be delivered to respondent's vessels directly from the installations of Standard Oil Company of New Jersey located in the State of New Jersey (R. 77, 93, 104, 106, 129, 131, 133).

The practice followed under the contracts in making the deliveries confirms the view that the parties contemplated

that the oil should be delivered from the bonded tanks of Standard Oil Company of New Jersey located at Bayonne and Bayway, New Jersey. It is true that in exceptional cases Standard Oil Company of New Jersey found itself short of "Standard" bunker "C" fuel oil when a call for it came in and in such an emergency it had to borrow from one of its competitors (R. 151). This exception occurred only in 5 out of 974 deliveries over a period of 8 years (R. 223-225; Taxpayer's Exhibit 27, R. 148, 257). Respondent did not know that these five deliveries came from the plants of companies other than Standard Oil Company of New Jersey (R. 152, 180). In two of the five deliveries Standard Oil Company of New Jersey borrowed oil from its competitor, Gulf Refining Company, whose installation was at Staten Island, New York (Taxpayer's Exhibit 27, R. 148, 258). In the other three cases in which "Standard" bunker "C" fuel oil was not delivered, the oil was borrowed from competitors of Standard Oil Company of New Jersey, whose installations were also in New Jersey.

(a) The facts are established by the state court.

The state court found as a fact that the contracts between the parties contemplated delivery of this fuel oil by Standard Oil Company of New Jersey from its plants in New Jersey to respondent's vessels (*Compagnie Generale Transatlantique* v. *McGoldrick*, 254 App. Div. 237, 240). The case was heard by the Appellate Division in the first instance pursuant to article 78 of the Civil Practice Act. In making its determination that court decided the questions of fact respecting the contract and the contemplation of the parties in favor of respondent. The Court of Appeals affirmed this determination (*Compagnie Generale Transatlantique* v. *McGoldrick*, 279 N. Y. 192) as it

had already done in a similar case (*National Cash Register Co.* v. *Taylor* (1937), 276 N. Y. 208; certiorari denied 303 U. S. 656). It said (279 N. Y. 198):

> "While the purchase or the contract of sale was made in New York, it was with a view of getting this specific oil, the product of the Standard Oil Company of New Jersey, from its plant and tanks in New Jersey. The product in New Jersey kept there in tanks, was the thing bargained for."
>
> • • •
>
> "It is the articles of this plant in New Jersey which the purchaser seeks."

The state court's determination of the essential facts respecting the contract and the contemplation of the parties should be accepted in this court.

Dower v. *Richards* (1894), 151 U. S. 658, 663-672;
Gleason v. *White* (1905), 199 U. S. 54, 60;
Minneapolis, St. Louis R. R. Co. v. *Minnesota* (1904), 193 U. S. 53, 64-65;
Wiloil Corp. v. *Pennsylvania* (1935), 294 U. S. 169.

(b) The conclusion of law reached by the state court followed inevitably.

The state court having determined as a matter of fact that the contract contemplated deliveries from New Jersey to New York, its conclusion that the contract was one "for interstate shipments" (279 N. Y. 198) followed inevitably. *Federal Trade Commission* v. *Pacific States Paper Trade Association* (1927), 273 U. S. 52, 64. In that case sales of paper were made by wholesalers to retailers in the same state and the paper was shipped from mills in another state. This Court held that those sales were interstate transactions.

The sales and deliveries of this oil, being transactions in interstate and foreign commerce, are exempt from the New York City sales tax (*Sonneborn Bros.* v. *Cureton* [1923], 262 U. S. 506, 515.)

Additional arguments and authorities on the foregoing points are adequately presented in Point I of respondent's brief and will not be repeated here.

Petitioner's brief on the interstate aspect of this case relies principally upon *Wiloil Corp.* v. *Pennsylvania* (1935), 294 U. S. 169 (p. 8); *Graybar Electric Co. Inc.* v. *Curry* (1939), 60 Sup. Ct. mem. 139, 259 (p. 10), and *Southern Pacific Co.* v. *Gallagher* (1939), 306 U. S. 167 (p. 12).

Wiloil Corp. v. *Pennsylvania, supra,* contains nothing contrary to our contentions here. That case was decided upon the same principle which had been applied before in *Banker Bros.* v. *Pennsylvania* (1911), 222 U. S. 210. The latter case involved sales of automobiles by local dealers to local purchasers. The automobiles were delivered to the dealers from outside the state, but deliveries by the dealer were purely intrastate transactions and were so held by the state court. No attempt was made to tax the interstate sale from the manufacturer to the dealer. Like the *Wiloil* case, there were two sales. One was interstate, from the manufacturer to the dealer. The second was intrastate, from the dealer to the purchaser. In the *Wiloil* case, oil was sold by Wiloil Corporation of Pittsburgh, Pennsylvania, to a local buyer in Pennsylvania. Apparently the seller had no supply of its own anywhere. Under the circumstances, deliveries from a Pennsylvania source would have been within the normal contemplation of the parties to the contract. The state court held that the liquid fuels in question were "sold and delivered to purchasers in Pennsylvania" (p. 174), an intrastate sale. The ruling

on that question was not challenged by the appellant in this Court and was held to be "binding upon it here" (p. 174). This Court therefore affirmed the decision of the state court holding that interstate commerce was not involved or burdened. The other sale by Crane Hook Company of Wilmington, Delaware, to Wiloil Corporation of Pittsburgh, Pennsylvania, an interstate sale, was not taxed or involved in the case.

In the present case, as distinguished from the *Wiloil* case, we have a contract with a seller whose sole source of supply is in New Jersey. There is only one sale involved here, that between the owner of the out-of-state oil and the purchaser.

Graybar Electric Co. Inc. v. *Curry* (60 Sup. Ct. mem. 139, 259), *supra,* was decided upon the authority of *Banker Bros. Co.* v. *Pennsylvania* (222 U. S. 210), *supra,* and *Wiloil Corp.* v. *Pennsylvania* (294 U. S. 169), *supra,* and established no new principle. In the *Graybar* case, the state only attempted to tax the local sale from Graybar Electric Co. Inc. to the intrastate purchaser. The other sale from General Electric Company to Graybar Electric Co. Inc., an interstate sale, was not sought to be taxed by the state.

Southern Pacific Co. v. *Gallagher* (306 U. S. 167), *supra,* construing the California use tax law, contains nothing contrary to our argument here. The articles taxed in that case "had reached the end of their interstate transportation and had not begun to be consumed in interstate operation" (page 177). They were not isolated from other property by any provision of law or official control. The tax was imposed upon "retention and installation", *i. e.,* "storage and use—retention and exercise of a right of ownership" within the state (pages 174, 177). The local law specifically exempted sales from the scope of the tax. The articles were not mov-

ing in interstate commerce when the tax accrued. The goods had come to rest. For that reason, the Court found there was a "taxable moment". There could be no "taxable moment" in this case because the tax was imposed not on use but on sale which was entirely an interstate transaction.

Petitioner's brief argues (page 11) that the danger of multiple taxation is not present in the situation involved in this case. This is incorrect. Multiple taxation is entirely possible if this tax be sustained as to these sales. On petitioner's theory the State of New Jersey could impose a tax, similar in form, on the seller, measured by the amount of gross receipts from sales, as is the present tax. Thus the interstate sale would bear the burden of two or more sales taxes as against one in respect of intrastate transactions. This is the kind of burden on interstate commerce which the Constitution was designed to prohibit. But whether or not multiple taxation is possible, the tax cannot be sustained where as here it is a direct burden on interstate and foreign commerce. It is not necessary for the taxpayer to show discrimination against interstate commerce. That the tax burdens interstate commerce is sufficient to invalidate it. This point was decided by this Court in the *State Freight Tax Case* (1872), 15 Wal. 232, and has been reaffirmed in subsequent cases, including *Crew Levick Co.* v. *Pennsylvania* (1917), 245 U. S. 292, *Spalding & Bros.* v. *Edwards* (1923), 262 U. S. 66, *Sonneborn Bros.* v. *Cureton* (1923), 262 U. S. 506, and *Adams* v. *Storen* (1938), 304 U. S. 307.

II.

The bonded and drawback oil never became a part of the general mass of property in the City of New York and therefore is exempt from the New York City sales tax by virtue of the commerce and imports clauses of the Constitution.

The controlling principles and authorities on this question are discussed in Point I of our brief in *McGoldrick* v. *Gulf Oil Corp., No. 473,* which is to be argued with this case.

III.

Fuel oil supplied to vessels engaged in foreign trade is an export and therefore is exempt from the New York City sales tax by virtue of Article 1, Section 10, Clause 2 of the Constitution, prohibiting state taxation of exports.

We have discussed the authorities in support of our argument on this question in Point II of our brief in *McGoldrick* v. *Gulf Oil Corp., No. 473,* to be argued with this case.

CONCLUSION.

The Court should rule that the bonded and drawback oil involved in this case is exempt from the New York City sales tax.

Respectfully submitted,

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December 30, 1939.

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